FOR ARGUMENT

No. 98-223

In The

Supreme Court of the United States

October Term, 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the warrantless seizure of Respondent's automobile pursuant to the Florida Contraband Forfeiture Act without a warrant and based upon statutorily mandated probable cause violated the Fourth Amendment of the United States Constitution. [Restated].

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, §12 of the Florida Constitution provides in pertinent part:

> Searches and seizures. This right shall be construed in conformity with the Fourth Amendment of the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

While Respondent essentially accepts Petitioner's Statement of the Case, the following facts are added or clarified:

1. All four doors of Respondent's 1983 Toyota automobile were locked when it was parked in the parking lot of his employer at the time of seizure. (JA-28-29; trial record (hereinafter "TR") at 22).

2. The inventory search that resulted because of the seizure of the vehicle occurred at the task force building, and no search, cursory or otherwise, occurred at the parking lot or en route as the car was driven to the task force building. (TR 21-22).

3. The two pieces of crack cocaine which resulted in the prosecution of this case were found wrapped inside a paper towel which was itself inside a paper bag which was in the ashtray of the car. (TR 17-18).

4. State's exhibit 2, a Florida vehicle registration certificate on a 1983 Toyota four-door car registered to Respondent, was admitted into evidence at the trial. (TR 18; 32-33).

5. The Florida Supreme Court in its opinion noted that it is "conceded that the government had no probable cause to believe that contraband was present in [Respondent's] car. . . . " (A 72; *White v. State*, 710 So.2d 949, 953 (Fla. 1998)).

6. Between the time in which alleged drug activities occurred in Respondent's car and the seizure of Respondent's car, 68 to 80 days passed.[1] (The dates of the alleged prior illegal activities were July 26, 1993, and August 4 and 7, 1993; Respondent's car was seized at his place of employment on October 14, 1993.) (A 65; *White* at 950).

7. The seizure of Respondent's car was preceded by this conversation between the officers: [Officer Squire testifying] "[Officer] Pierce told me that he intended to seize [Respondent's] vehicle for forfeiture and he asked me to go along to bring the vehicle back." [A 23].

SUMMARY OF THE ARGUMENT

Essentially, the validity of law enforcement's seizure of Respondent's automobile is predicated upon an asserted analogy to the warrantless arrest of a person, the so-called plain view exception to the warrant requirement, and the so-called automobile exception to the warrant requirement.

The warrantless arrest of a person is not constitutional in all instances and has been limited by this Court's decisions. Moreover, arrests of persons are distinguishable from seizures of property for forfeiture, and procedural safeguards are afforded people who are arrested

[1] Actually, from the earliest date (July 26, 1993) to the date of seizure was 80 days, with the next earliest date (August 4, 1993) to the date of seizure 71 days. The range of days in which law enforcement could have gotten a warrant is thus 68 days (least) to 80 days (most).

which are not afforded property seized under the Florida Contraband Forfeiture Act.

The plain view exception is simply inapplicable here. Historically, this exception was applicable only to contraband *per se* or to evidence of a crime. The so-called "contraband" involved here is "derivative" contraband, not contraband *per se*. There was no contention below that the car which was seized from Respondent was to be used as evidence, and indeed it was not used as evidence at Respondent's trial.

Additionally, a seizure leads to a search as night follows day. The Fourth Amendment protects against unreasonable warrantless seizures, as well as searches.

The only probable cause available here is the statutorily provided derivative probable cause, and it arises only by virtue of the object's association with *per se* contraband. Petitioner's interpretation of the statute impermissibly allows a law enforcement agent in the field first to determine that contraband has been used in the seized vehicle, and then to determine at any time that the vehicle is subject to seizure. Judicial oversight is missing, and this violates the Fourth Amendment's prohibition against unreasonable warrantless seizures.

Additionally, the statute raises to an absolute the imprimatur of the derived contraband. Absolute *per se* rules are disfavored in Fourth Amendment analysis.

Because there is no judicial oversight over the determination by the field agent to seize the vehicle, and because forfeitures are punitive in nature, the warrantless

seizure of Respondent's automobile in this case was unreasonable.

Last, but not least, the automobile exception was inapplicable. The Petitioner conceded below that it had no probable cause to believe that contraband was presently in Respondent's automobile, and that exigent circumstances did not exist. After all, 68 to 80 days elapsed between the time in which the alleged illegal activities occurred in the car and the time in which the car was seized: 68 to 80 days in which law enforcement could have obtained a warrant but did not bother to do so. This is constitutionally impermissible.

ARGUMENT

ISSUE

WHETHER THE WARRANTLESS SEIZURE OF RESPONDENT'S AUTOMOBILE PURSUANT TO THE FLORIDA CONTRABAND FORFEITURE ACT WITHOUT A WARRANT AND BASED UPON STATUTORILY MANDATED PROBABLE CAUSE VIOLATED THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION. [RESTATED].

Pursuant to the Florida Contraband Forfeiture Act, Florida Statute Sections 932.701 *et seq.*, Respondent was arrested at his place of employment, and his vehicle seized from the parking lot 68 to 80 days after prior alleged drug activity took place in it. At the time of the seizure, law enforcement authorities had no reason to believe that contraband was to be found in his car. So-called probable cause to seize the car was provided by virtue of Respondent's alleged earlier illegal activity in

the car and Section 932.703(1)(a), Florida Statutes, which provides that any motor vehicle which is used to transport, conceal, or possess contraband articles "may be seized and shall be forfeited" subject to its provisions.

The Florida Supreme Court in the opinion below found that the warrantless seizure of Respondent's automobile without probable cause[2] and exigent circumstances violated the Fourth Amendment's prohibition against unreasonable warrantless seizures.

In so holding, the Florida Supreme Court found that none of the traditional exceptions to the warrant requirement argued below were applicable, that the Fourth Amendment requires that absent exigent circumstances, law enforcement must secure a warrant for the search and seizure of an automobile, and that no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances.

Respondent's position (simply) is that unless this Court wishes to knock another hole in the Fourth Amendment, none of the traditional exceptions to the Fourth Amendment's prohibition of unreasonable warrantless seizures apply, and that law enforcement had neither "traditional" probable cause nor exigent circumstances in which to seize Respondent's 1983 Toyota car.[3]

Petitioner, the Solicitor General of the United States, and the various Attorneys General of 27 listed states have

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[2] Except for the derivative "probable cause" provided by the statute.

[3] "An ill-favoured thing, sir, but mine own." Shakespeare, *As You Like It* (1599-1600), 5.4.60.

filed, respectively, a merits brief and amicus curiae briefs. Arguments from each will be responded to separately.

PETITIONER STATE OF FLORIDA'S ARGUMENTS REFUTED

Initially, the question presented to this Court in its petition for writ of certiorari was:

> WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A WARRANT IS REQUIRED BY THE FOURTH AMENDMENT TO SEIZE A MOTOR VEHICLE UNDER A CONTRABAND FORFEITURE ACT AND FOR SUBSEQUENT SEARCH OF SAID VEHICLE CONFLICTS WITH DECISIONS OF THE COURT IN *CARROLL V. UNITED STATES, CALERO-TOLEDO V. PEARSON YACHT LEASING*, AND *COOPER V. CALIFORNIA*, THAT OF THE ELEVENTH CIRCUIT IN *UNITED STATES V. VALDES* AND THE MAJORITY OF STATE COURTS ADDRESSING THIS ISSUE?

Subsequently, in its merits brief, the Petitioner has transmogrified this issue to:

> WHETHER THE FOURTH AMENDMENT REQUIRES AN ANTECEDENT WARRANT FOR SEIZURE OF A MOTOR VEHICLE UPON PROBABLE CAUSE UNDER A CONTRABAND FORFEITURE ACT (RESTATED).[4]

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[4] Rule 24.1.(a), of the rules of this Court apparently allows the rephrasing of the issue without raising additional questions or changing the substance of the question already presented.

Because this Court accepted jurisdiction based on the original question, Respondent will briefly dispatch it.

In *Carroll, et al. v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), this Court concluded that the government had probable cause to believe that contraband was presently being transported and that because of exigent circumstances created by the mobility of a vehicle, immediate seizure was permissible. The "probable cause" involved in *Carroll* was not probable cause that the vehicle was subject to forfeiture, but probable cause that at the time of the seizure the vehicle carried contraband goods (prohibited alcohol).

As this Court noted in *Carroll*, the " . . . main purpose of the act (involved in *Carroll*) obviously was to deal with the liquor and its transportation, and to destroy it." 267 U.S. at 154. This court concluded in *Carroll* that probable cause existed to believe " . . . that intoxicating liquor *was being* transported in the automobile which" the agents stopped and searched. (Emphasis added; 267 U.S. at 162).

It is clear from the context of *Carroll* that the probable cause involved was probable cause to believe that contraband was presently being transported by the vehicle. In that light, this Court went on to caution that otherwise warrantless seizures were disfavored:

> In cases where the securing of warrant is reasonably practicable, *it must be used* and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.

> *United States v. Kaplan*, (D.C.), 286 F.963, 972. [*Carroll* at 267 U.S. 156; emphasis added].

Clearly, *Carroll* does not support the Petitioner's contention that the Florida Supreme Court's opinion conflicts with the decisions of this court.

This Court's holding in *Calero-Toledo v. Pearson Yacht Leasing Company*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), likewise in no way conflicts with the holding of the Florida Supreme Court's decision in this case. In *Calero-Toledo*, this Court specifically noted in footnote 14 that: "We have no occasion to address the question whether the Fourth Amendment warrant or probable-cause requirements are applicable to seizures under the Puerto Rican statutes." 416 U.S. at 679, 40 L.Ed.2d at 466.

Calero-Toledo v. Pearson Yacht Leasing Company was decided under federal constitutional due process requirements, not Fourth Amendment requirements.[5] Moreover, the aggrieved party sought an *adversarial* pre-seizure hearing, not merely a pre-seizure *ex parte* review by a magistrate.

Finally, the Florida Supreme Court's decision does not conflict with *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). In *Cooper*, although this Court upheld an inventory search of a car which had been seized pursuant to a California forfeiture statute, the

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[5] Activities by law enforcement may offend one amendment of the Constitution but not another. *See Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488, n.4 (1993). *See also United States v. James Daniel Good Real Property, et al.*, 510 U.S. 43, 49-50, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

legality of the seizure (as opposed to the search) was never at issue.

In *United States v. Valdes*, 876 F.2d 1554 (11th Cir. 1989), pursuant to Title 21 United States Code Section 881(b)(4), the automobiles were seized because the agents had probable cause to believe that they were subject to forfeiture by virtue of their use in (prior) drug transactions. The Eleventh Circuit admitted (footnote 7 at 1557) that the seizures of the automobiles could not be sustained under any of the exceptions to the Fourth Amendment warrant requirement.

Nonetheless, the Eleventh Circuit upheld the seizures based upon *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) on the theory that under appropriate circumstances a person could be arrested without a warrant, the cost to the police in *Watson* was too great to society to obtain a warrant, and if people could be arrested without a warrant it would be anomalous " . . . [to] accord the trafficker's property interest [footnote omitted] greater deference than his liberty interest. . . . " *Id.* at 876 F.2d 1560.

This brings us to the gravamen of Petitioner's main complaint in its merits brief, i.e., why if people may be arrested under certain circumstances without a warrant should their property not be arrested without a warrant pursuant to the "strictures" of the Florida Contraband Forfeiture Act?

The first answer to that question is that people cannot always be arrested without a warrant. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 13 L.Ed.2d 639 (1980) [arrest warrant required to enter the suspect's dwelling

when there is reason to believe that he is within]. Moreover, even an arrest warrant of a person has limitations: *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) [arrest warrant does not authorize entry into the home of a third party to look for the suspect absent exigent circumstances] and *United States v. Watson, supra* [warrantless arrest for a felony based on probable cause may be made in a public place without exigent circumstance but a warrant is preferred].

Next, it should be noted that an arrested person has rights that the seized property pursuant to the Florida Contraband Forfeiture Act does not have. For instance, a person is entitled to a first appearance within 48 hours with the burden on the government to prove probable cause for his arrest and continued detention. *See*, for example, *Riverside County, California v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) and *Powell v. Nevada*, 511 U.S. 79, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994).[6]

Furthermore, the arrest of a person without a warrant (as opposed to the seizure of property) is bottomed, in part at least, on the *public safety*. *See Watson* at 423 U.S. 419-420, relying on language from *Rohane v. Swain*, 59 Mass. 281, 284-285 (1850). ("The public safety, and due apprehension of criminals, charged with heinous offenses, imperiously require that such arrests should be made without warrant by officers of the law.")

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[6] In the state of Florida, for instance, every arrested person is entitled to a prompt first appearance before a judicial officer within 24 hours of arrest. Florida Rule of Criminal Procedure 3.130.

Of course, the protections of the Fourth Amendment are not limited to persons:

> The right of the people to be secure in their persons, houses, papers, and *effects*, against *unreasonable searches and seizures*, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or *things* to be *seized*. [Emphasis added].

The Florida Supreme Court observed that the limit to protections of the Fourth Amendment to seizures of only persons would undermine its effectiveness:

> The United States Supreme Court has purposely subjected the Fourth Amendment to only a "few well-delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). For example, the courts have carefully restricted the law of search and seizure to permit a limited search of an arrestee and his person "incident" to a valid arrest. *See, Chimel v. California*, 395 U.S. 752 (1969). However, the reasoning of the district court majority, if carried to its logical bounds, would do away with the limitations established to a search incident to a lawful arrest and now permit a search of anything, anywhere, based upon probable cause, without a warrant, since those actions involving property would obviously be less intrusive than seizing the person. Obviously, we are not willing to accept such a proposition and its implication. [Footnote omitted; A 75; *White* at 954].

Perhaps the overarching theme of Petitioner's argument is that if this Court requires a warrant under the

circumstances presented, law enforcement will be hampered by " . . . an inflexible procedural barrier in the path of effective law enforcement. . . . " (Petitioner's brief at 5).

First, the Fourth Amendment does not exist to promote "safe," "effective," or "imaginative" law enforcement. It exists to protect the *people* from unreasonable warrantless searches and seizures.

As Justice Marshall wrote, with Justices Blackmun and Stephens joining, in the dissent of *Florida v. Bostick*, 501 U.S. 429, 440, 111 S.Ct. 2382, 115 L.Ed.2d 389, 402 (1991) with the apparent approval of the majority at 501 U.S. 439:

> Our Nation, we are told, is engaged in a "war on drugs." No one disputes that it is the job of law-enforcement officials to devise effective weapons for fighting this war. But the effectiveness of a law enforcement technique is not proof of its constitutionality. The general warrant, for example, was certainly an effective means of law enforcement. Yet it was one of the primary aims of the Fourth Amendment to protect citizens from the tyranny of being singled out for search and seizure without particularized suspicion *notwithstanding* the effectiveness of this method. *See Boyd v. United States*, 116 U.S. 616, 625-630, 29 L.Ed.2d 746, 6 S.Ct. 524 (1886). *See also, Harris v. United States*, 331 U.S. 145, 171, 91 L.Ed. 1399, 67 S.Ct. 1098 (1947).

Finally, Petitioner argues that the "innocent owner" provisions of the statute are adequate safeguards. They are not, because the burden is on the innocent owner to assert them. More importantly, they are *not* parts of the

constitution and may be removed at any time by the legislature and/or Congress.

THE SOLICITOR GENERAL OF THE UNITED STATES' ARGUMENTS REFUTED

Amicus Curiae Solicitor General of the United States presents a syllogistic[7] argument which is presented here for the first time as it was not presented to the courts below. However, this argument does appear to have been broached in *United States v. Dixon*, 1 F.3d 1080 (10th Cir. 1993).

The Solicitor General's syllogism goes something like this: warrantless seizures based upon probable cause have been upheld so long as the seizure was effected in a manner that does not intrude on privacy interests; the seizure at issue in this case satisfies the requirements laid out in *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) [inadvertence is not required for seizure under the plain view doctrine]; the absence of exigent circumstances did not invalidate the seizure of Respondent's 1983 Toyota; just so long as the police had probable cause to believe that Respondent's vehicle had previously been used to facilitate narcotics trafficking the seizure of the automobile was valid; and once seized, the inventory search of Respondent's automobile allowed

[7] "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." Oliver Wendell Holmes, Jr., (1841-1935), *The Common Law* [1881].

introduction of the evidence found during the search to be admitted properly at Respondent's trial.

The substance of the Solicitor General's argument is simply that "seizures" are different than "searches," in that they only involve "possession" and not "privacy" rights; that the "plain view" exception to the warrant requirement applies because under the appropriate forfeiture statute probable cause existed to believe that Respondent's automobile had been used to transport drugs or to sell drugs out of it, that the officers were in a public place and "recognized" the automobile as contraband, and that under the plain view doctrine they had every right to seize it. Once they seized it, pursuant to the "inventory" rationale, they had every right to search it and the fruits of that search were admissible into evidence.

Simply put, the response to the Solicitor General's arguments is that "seizures" are protected every bit as much as "searches" under the Fourth Amendment, the plain view exception is inapplicable, and the Florida Contraband Forfeiture Act violates the requirements of the Fourth Amendment against unreasonable warrantless seizures.

SEIZURES UNDER THE FOURTH AMENDMENT

The Fourth Amendment protects against unreasonable "searches" *and* "seizures." The parallel conjunctive term "and" does not imply that searches are constitutionally more important or more protected than seizures; its very use implies their equivalence.

Moreover, phrases such as "possession is nine tenths of the law" and "finders keepers, losers weepers" are an expression by the common man that loss of possession of an item implies loss of all rights (in a practical sense) regardless of judicial niceties.[8]

Once law enforcement has seized a vehicle, as night follows day, law enforcement will conduct an inventory search of it. *United States v. Pappas*, 613 F.2d 324, 331 n.10 (1st Cir. 1979) ("In forfeiture cases the protective function of an inventory search is particularly important since the vehicle may be retained in possession of the government for months before forfeiture proceedings are instituted.").

Thus, a "seizure" inevitably implicates privacy rights[9] as well as possessory interests. Of course, a

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[8] "The life of the law has not been logic; it has been experience." Holmes, *The Common Law* [1881]. *See, One 1958 Plymouth Sedan v. Com. of Pennsylvania*, 380 U.S. 693, 701, 14 L.Ed.2d 170, 175, fn.11 (1965), stating that in *Boyd v. United States*, 116 U.S. 616 (1886) the Court had "rejected any argument that the technical character of a forfeiture as an in rem proceeding against the goods had any effect on the right of the owner of the goods to assert as a defense violations of his constitutional rights". Further, in *Plymouth*, at 701 fn.11, the Court quoted approvingly this passage from *Boyd*, (at 638), that "although the owner of goods, sought to be forfeited by a proceeding in rem, is not the nominal party, he is, nevertheless, the substantial party to the suit. . . ."

[9] *See Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387, 401, n.12 (1978) which in pertinent part states: "One of the main rights attaching to property is the right to exclude others, *see* W. Blackstone, *Commentaries*, Book 2, Ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."

seizure which only implicates "possessory" rights may also constitute a warrantless unreasonable seizure under the Fourth Amendment. *See Soldal et ux. v. Cook County, Illinois et al.*, 506 U.S. 56, 68, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) ("But our cases are to the contrary and hold that seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the amendment has taken place.")

Thus, the attempt by the Solicitor General to parse the Fourth Amendment's protection of searches versus seizures is meaningless and trivializes the significant protections afforded by that amendment. Ultimately, the seizure, which may be and usually is more disruptive than the search, will result in a search, and loss of privacy rights. Indeed, *Cooper v. California, supra*, is such an example, as is this case (where the seizure led directly to the search of Respondent's automobile).

PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT IS INAPPLICABLE TO THIS CASE

The crux of the plain view exception is that officers are in a place where they have a right to be (either by operation of a warrant or by virtue of being in a public place) where they come across "contraband" (items *per se* illegal) or evidence of a crime. The plain view exception was never developed nor intended to be applied in a "forfeiture" case where the "probable cause" to believe that the item seized is artificially supplied by a statute as

opposed to contraband *per se* or evidence of a crime.[10] In *United States v. Place*, 462 U.S. 696, 701, 702, 103 S.Ct. 263, 77 L.Ed.2d 110 (1983), this Court stated:

> In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. [Footnote omitted] See, e.g., Marron v. United States, 275 US 192, 196, 72 L Ed 231, 48 S Ct 74 (1927). Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present. See, e.g.,

[10] To date, there has been no contention whatsoever that the car itself was "evidence" of a crime. It was not introduced into evidence at Respondent's trial, although the vehicle registration certificate was introduced into evidence. However, the latter is a public document. At any rate, the car was not "seized" as evidence of a crime; it was "seized" because of the provision in the Florida Contraband Forfeiture Act which made it "derivative" contraband by virtue of having contraband possessed in it or contraband sold out of it. Moreover, when an officer seizes evidence of a crime in plain view, his agency doesn't stand to gain monetarily as it does when an officer seizes derivative contraband and gets the proceeds from its sale. *See* note 13, *infra* and *Austin* at 509 U.S. 620, 125 L.Ed.2d 504. *See*, also, *United States v. Good Real Property*, 510 U.S. at 43, 56, fn.2 and *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

> Arkansas v. Sanders, 442 US 753, 761, 61 L Ed 2d 235, 99 S Ct 2586 (1979); United States v Chadwick, 433 US 1, 53 L Ed 2d 538, 97 S Ct 2476 (1977); Coolidge v. New Hampshire, 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971). [Footnote omitted] For example, "objects such as weapons or contraband found in a public place may be seized by the police without a warrant," Payton v. New York, 445 US 573, 587, 63 L Ed 2d 639, 100 S Ct 1371 (1980), because, under these circumstances, the risk of the item's disappearance or use for its intended purpose before a warrant may be obtained outweighs the interest in possession.

The latter two examples show that the "plain view" exception simply doesn't apply, and that forfeitures are different.

Here, law enforcement was not concerned with the risk of the car's disappearance or its continued use to allegedly convey drugs because if it had been, it would not have waited *80* days to seize the car!

The statute provides that "probable cause" to seize a car like Respondent's for forfeiture occurs when drugs are possessed, transported in, or sold out of the vehicle. This has been described (with good reason) by this Court in *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 699, 85 S.Ct. 1246, 14 L.Ed.2d 170, 174 (1965) as "derivative" contraband. It is not contraband that is *per se* illegal, and it is not (in and of itself) evidence of a crime which would justify its seizure under the plain view exception to the warrant requirement.

As this Court noted in *Austin v. United States*, 509 U.S. 602, 621, 113 S.Ct. 2801, 125 L.Ed.2d 488, 505 (1993):

The Court, however, previously has rejected the Government's attempt to extend that reasoning to conveyances used to transport illegal liquor. *See One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 14 L.Ed.2d 170, 85 S.Ct. 1246 (1965). In that case it noted:

> There is nothing even remotely criminal in possessing an automobile. *Ibid.*
>
> The same, without question, is true of the properties involved here, and the Government's attempt to characterize these properties as "instruments" of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth Sedan as "contraband."[11]

At this point, the real evil of the Florida Contraband Forfeiture Act begins to become apparent. That evil is, quite simply, that the Act declares an otherwise innocent object "contraband" and then allows a law enforcement officer in the field[12] to make the subjective determination that a drug crime has occurred in the car which in turn makes this otherwise innocent vehicle "contraband." To the uninitiated, the car is just a car. To law enforcement, who has made the determination (unconstitutionally)

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[11] The statute involved in *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania* made a vehicle which carried prohibited liquor contraband, just like the Florida Contraband Forfeiture Act makes an automobile which carries drugs contraband. *One Plymouth Sedan* at 171, note 2.

[12] Interestingly enough, Title 21 United States Code 881 provides for the Attorney General of the United States to make this determination, not a field officer like the Florida Contraband Forfeiture Act. It should also be noted that 881(b) explicitly does *not* require a warrant but the Florida Statute is *silent* as to whether a warrant is required.

allowed by the Florida Contraband Forfeiture Act, the car is now "contraband." This entire process has taken place out of the purview or review of the judiciary, and is at the sole discretion of a totally biased law enforcement official, who may have interests tied to his or her department's benefit at stake.[13]

Thus, the determination that is used to evade the Fourth Amendment's proscription against unreasonable warrantless seizures is made at the whim of a law enforcement officer in the field. This is the very kind of arbitrary and capricious discretion which this Court in the past has limited. *See, Camara v. Municipal Court*, 387 U.S. 523, 529, 87 S.Ct. 1727, 18 L.Ed.2d 930, 935 (1967) wherein this Court stated [involving searches]: "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, *not by a policeman or a government enforcement agent.*" [Emphasis added].

There is something even more anathema about the Act's determination that once an officer observes proscribed activity in the vehicle, the vehicle is forever contraband.[14] When the Act is allowed to declare the car

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[13] The Act allows some of the revenue from the forfeited vehicle to go to the seizing agency. *See* Section 932.704(1), Florida Statutes, which authorizes "such law enforcement agencies to use the proceeds collected under the Florida Contraband Forfeiture Act as supplemental funding for authorized purposes." The seizing agency may keep the seized item, further injecting the self-interest of the seizing agents. Section 932.7055(1)(a), Florida Statutes.

[14] The position of the Solicitor General is, based upon *United States v. Kemp*, 690 F.2d 397 (4th Cir. 1982), that once the

contraband forever by virtue of contraband having been transported in or sold out of it, even though the car is to all intents and purposes a lawful object to the uninitiated, and when the Act allows the law enforcement officer in the field to make that determination without prior judicial review, what the Act has done is prescribe a "*per se* rule" which is wholly inconsistent with this Court's past Fourth Amendment analysis. Should the Petitioner's argument prevail here the effect would be adoption of a *per se* rule that regardless of the circumstances, law enforcement may *always* seize vehicles and other property as derivative contraband under a forfeiture act without obtaining a warrant or demonstrating an exception to the warrant requirement. The notion that vehicle seizures occurring in plain view under a forfeiture law are always exempt from the warrant requirement runs afoul of *Florida v. Bostick, supra,* 501 U.S. 429, which "adhere[d] to the rule that, in order to determine whether a particular encounter constitutes a seizure, *a court must consider all the circumstances. . . .* " *Id.* at 439. (Emphasis added).

The Florida Supreme Court was attempting to effectuate the interests of the people under the Fourth Amendment rather than law enforcement by requiring seizures under the Contraband Forfeiture Act to be subject to the Warrant Clause. While probable cause in some cases may be virtually indisputable, other situations are not so clear.

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agent declares the vehicle contraband, it is forever contraband. (Solicitor General's amicus curiae brief at 23-24). The Solicitor General has neglected to mention that there is a split amongst the circuits on this issue as well. *United States v. Pappas,* 613 F.2d 324 (1st Cir. 1979) (en banc).

Compare, e.g., City of Edgewood v. Williams, 556 So.2d 1390 (Fla. 1990) (forfeiture not allowed), *with, Duckham v. State,* 478 So.2d 347 (Fla. 1985) (forfeiture allowed). In those close cases at least, the determination of probable cause by a judicial officer supplies protection from the non-neutral and unilateral assessment of probable cause made by law enforcement.

Obtaining a warrant or demonstrating a "traditional" exception to the warrant requirement imposes no substantial countervailing impediment to law enforcement. The Florida Supreme Court previously said the state could make an *ex parte* application to a magistrate:

> *In those situations where the state has not yet taken possession of the personal property that it wishes to be forfeited, the state may seek an ex parte preliminary hearing. At that hearing, the court shall authorize seizure of the personal property if it finds probable cause to maintain the forfeiture action.* (Emphasis added).

Department of Law Enforcement v. Real Property, 588 So.2d 957, 965 (Fla. 1991).

The *ex parte* proceeding thus avoids the threat that "preseizure notice and hearing might frustrate the interests. . . . " served by the forfeiture statutes. *Calero-Toledo v. Pearson Yacht Leasing Co., supra,* 416 U.S. at 659, 40 L.Ed.2d at 466. Even when property is "of a sort that could be removed to another jurisdiction, destroyed, or concealed if advance notice of the confiscation were given," *ibid,* the interests of the state are sufficiently insulated from that possibility by having probable cause presented to a magistrate *without notice to the property's owners or possessors.*

Finally, there is another problem with the law enforcement agent making the determination allowed by the Act. The Act is still not exempted from Fourth Amendment analysis.[15] Forfeitures are not favored in the law, *United States v. One 1936 Model Ford V-8*, 307 U.S. 219, 59 S.Ct. 861, 83 L.Ed.2d 1249 (1939), and they are punitive in nature. *Austin v. United States, supra*, 509 U.S. 621-622. Hence, without judicial review, a field agent is *a priori* punishing someone by seizing their vehicle. This, without judicial oversight prior to the seizure, cannot constitutionally be tolerated.

In summary, seizures involve more than mere "possession" because once an object is seized it inevitably will be searched. The plain view exception in this case is inapplicable. It was never developed for forfeiture proceedings and derivative contraband. Moreover, the Florida Contraband Forfeiture Act, in the ultimate legislative tautology, declares the subject vehicle contraband by virtue of its transporting contraband and then allows a mere field agent to determine without judicial review that qualifying criminal behavior has occurred in the vehicle. The Act also allows an agent, again without judicial review, to punitively seize the car. In doing so, the Florida Contraband Forfeiture Act makes a rigid, absolute rule, which is disfavored in Fourth Amendment analysis.

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[15] As the court in *United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992), and upon which the Florida Supreme Court heavily relied below noted: "There is no Fourth Amendment exception to 'civil forfeiture' and Congress has no right to amend the Constitution." *Id.* at 1304.

None of this was ever intended by the framers of the Constitution when the Fourth Amendment was drafted.

ARGUMENTS OF THE TWENTY-SEVEN STATES AS REPRESENTED BY THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL REFUTED

At the outset, it cannot but help be noted that the Solicitor General's and the National Association of Attorneys General's briefs overlap. Each raises the plain view exception.[16]

Up until this point, little has been said of perhaps the most obvious question in this case, to wit: Given that 68 to 80 days elapsed between the time of the alleged illegal activity in the vehicle and the time in which the vehicle was seized why did law enforcement not bother to obtain a warrant?

Possible answers are inconvenience, arrogance, and the fact that the Florida Contraband Forfeiture Act does not explicitly require one.[17]

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[16] *See* Rule 37.1, of the rules of this Court which states, in pertinent part, that a brief which brings to the attention of the Court relevant matter not already brought to this Court's attention may be of considerable help to this Court but one that does not serve this purpose burdens the Court.

[17] The Solicitor General notes in his brief at page 2, footnote 1 that as a matter of policy, the Justice Department encourages the use of prior seizure warrants whenever practicable because of the split in the circuits. Can anyone believe that in this case given the 68 to 80 days in which to get one it was impractical to obtain a warrant? And more importantly, can anyone doubt that

None of these reasons are constitutionally good enough.

The cost involved was the warrantless seizure of Respondent's automobile, to the detriment of the Fourth Amendment. The benefit involved was that law enforcement was allowed and is allowed at the present time in 27 states and in certain federal jurisdictions to run a warrantless used car lot.

The National Association of Attorneys General representing the 27 states presents three arguments: Plain view, which has already been dealt with; the automobile exception, which will be dealt with *infra*; and a due process argument, which is not at issue.

Recall that the Government in this case has conceded that it had no probable cause to believe that contraband was present in the vehicle at the time of the seizure. (A 72). Remember, too, that the contraband itself was found wrapped in a paper towel, inside a brown bag, in the ashtray of the car, and all four doors of the car were locked. Hence, there is no possible way that law enforcement could have concluded that contraband was present in the car absent a seizure and subsequent search of the car.

The Florida Supreme Court effectively disputed the validity of the so-called automobile exception in this case:

> As previously noted, the *only* basis asserted for the unauthorized government seizure here is the

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this policy of the Justice Department will last one millisecond if this Court holds that a warrant is unnecessary under these circumstances?

so-called automobile exception to the warrant requirement. The district court majority cited *California v. Carney*, 471 U.S. 386, 391 (1985), for the proposition that automobiles are afforded less Fourth Amendment protection against warrantless searches and seizures due to their "ready mobility" and diminished expectations of privacy due to their pervasive governmental regulation. The automobile exception is predicated upon the existence of exigent circumstances consisting of the known presence of contraband in the automobile at the time, contraband will be lost if it is not immediately seized because of the mobility of the automobile. *See Chambers v. Maroney*, 399 U.S. 42 (1970). For example, in *Carney*, law enforcement officers had direct evidence[5] that illegal drugs were present and that the suspect was distributing illegal drugs from the vehicle. Accordingly, the Court concluded that the officers "had abundant probable cause to enter and search the vehicle for evidence of a crime." *Carney*, 471 U.S. at 395.

Since it is conceded that the government had no probable cause to believe that contraband was present in White's car, we conclude that *Carney* and the automobile exception are inapposite as authority. There is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband and that an opportunity to seize the contraband may be lost if not acted on immediately, and the altogether different proposition of permitting the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time

> in the past to assist in illegal activity. The exigent circumstances implicit in the former situation are simply not present in the latter situation.
>
> [5]A young man who had just left the motor home only moments before told agents of the Drug Enforcement Administration that he had received marijuana from the suspect while in the motor home. *Carney*, 471 U.S. at 388.

(A 71-72). Moreover, if it is argued that the probable cause necessary for the automobile exception is the probable cause provided by the alleged fact that the automobile was used to transport contraband, this argument has already been answered in the previous segment of this brief.

None of the applicable, existing warrant exceptions allowed the seizure of Respondent's vehicle. Unless this Court intends to knock another hole in the Fourth Amendment, the warrantless seizure of Respondent's automobile was unconstitutional.

As the Florida Supreme Court stated in footnote 7 of its opinion:

> As [former Florida Supreme Court Chief Justice Kogan] recently reminded us, the genius of our Federal and State Constitutions is that they define basic rights that neither the legislative nor executive branches can modify. [Citation omitted from Kogan's dissenting opinion]. These remarkable documents fenced off from the 'ordinary political process' these rights guaranteed by all Americans by ensuring they 'could

> not be repealed by a mere majority vote of legislators nor . . . alter[ed] through any process except constitutional amendment.' [A 75]

If the people want their Constitution amended in the circumstances presented by this case, then let them do it. This Court should not amend the Constitution by case law.

At issue is whether the Fourth Amendment will fence off law enforcement[18] to a "few well-delineated exceptions" [in the language of *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)] or whether this Court will fence the Fourth Amendment off from law enforcement and allow it to run constitutionally amok over the Constitution.

The judicial preference for a warrant will be meaningless if this Court rules against Respondent. For the people, whom this Court is sworn to protect, better to make this judicial preference a rigid absolute than to abolish it entirely.

Finally, the legality of this Court's decision is not at issue. Because this Court is last, whatever opinion it issues will be legal. But the wisdom of it is at issue. The wise thing to do is to err (if err at all) on the side of the Fourth Amendment, not law enforcement.

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[18] *See California v. Acevedo*, 500 U.S. 565, 586, 111 S.Ct. 1982, 114 L.Ed.2d 619, 638 (1991), Stevens, J., dissenting with Marshall, J., noting that "The Fourth Amendment is a restraint on Executive Power." *See also* the concurring opinion of Scalia, J., who noted that one commentator had "catalogued nearly 20 [warrantless] exceptions" to the Fourth Amendment. *Id.* at 500 U.S. 582.

As this Court noted in *Johnson v. United States*, 333 U.S. 10, 14-15, 68 S.Ct. 367, 92 L.Ed. 436 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.* (Emphasis added).

CONCLUSION

Based on the foregoing, the Respondent respectfully submits that this Court should rule that absent traditional exception to the warrant requirement of the Fourth Amendment, a warrant is required prior to seizure of property for forfeiture.

Respectfully submitted,

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